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No: 08-1459

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

v.

JASMINE DORSEY,

Respondent.

On Petition for Writ of Certiorari
To the Michigan Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE QUESTIONS PRESENTED

I The Petition presents no sound basis for this Court to exercise jurisdiction. The facts reflected in this record are not distinguishable from those in *Ybarra v Illinois* in any significant respect, and therefore, mandate suppression of the evidence that police seized as a result of their unconstitutional search of Ms. Dorsey

II The police are bound by the confines of their search warrant based upon the facts submitted to the magistrate in the affidavit. The police should not be allowed to search persons who are merely present where there is insufficient probable cause to do so. Ms. Dorsey's purse was not within the scope of the warrant.

TABLE OF CONTENTS

Page

Counter Statement of Questions Presented 1

Index of Authorities 3

Index to Appendix 4

Statement of Jurisdiction 5

Constitutional Provisions Involved 5

Counter Statement of Facts 6

Reasons to Deny Petition

Introduction 9

Discussion 9

Argument I 9

Argument II 22

Conclusion 29

Relief 30

INDEX OF AUTHORITIES

FEDERAL CASES

Page

Michigan v Summers,
452 U.S. 692; 101 S. Ct. 2587; 69 L. Ed. 2d 340 (1981) 23,25,27

Muehler v Mena,
544 U.S. 93, 95; 125 S. Ct. 1465, 1468 ;
161 L. Ed . 2d 299, 305 (2005) 24,26,27

Segura v United States,
468 U.S .796; 104 S. Ct. 3380; 82 L.Ed.2d 599 (1983) 24

Terry v. Ohio,
392 U.S. 192; 88 S .Ct. 1868; 92 L.Ed.2d 210 (1968) 26

United States v Yousif,
308 F3d 820 (8th Cir 2002) 11

Wong Sun v. United States,
371 U.S. 471; 83 S. Ct. 407; 9 L. Ed.2d 441 (1963) 11

Wyoming v Houghton,
526 U.S.. 295;119 S Ct .1297; 143 L.Ed.2d 408 (1999) 17

Ybarra v Illinois,
444 U.S. 85; 100 S. Ct. 338; 62 L.Ed.2d 238 (1979) 10,11,12,13,
14,15,17,20,22,25,26,27

STATE CASES

People v Burbank,
137 Mich. App. 266; 358 NW2d 266 (1984) 14,17

People v Coleman,
436 Mich. 124; 461 NW2d 615 (1990) 18,19

People v Hawkins,
163 Mich. App. 196, 197; 413 NW2d 704 (1987) *16*

People v LoCicero,
453 Mich. 496; 556 NW2d 498 (1996) 12

People v. Secrest,
413 Mich. 521, 528; 321 NW2d 368 (1982) 15

CONSTITUTIONAL PROVISIONS

US Const, Am IV, XIIV .....

COURT RULE

Michigan Court Rule 7.210 (A)(1) 6

STATEMENT OF JURISDICTION

Respondent does not dispute that this Honorable Court has jurisdiction to review this matter.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United Sates Constitution provides:

> The right of the People to be secure in their persons houses, and effects against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ....No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

COUNTER-STATEMENT OF FACTS

First, Appellee asks this Honorable Court to note that the Search Warrant and Affidavit underlying the search in this matter was not admitted at either the preliminary examination or the motion hearing in the trial court. Therefore, it did not properly form part of the record for this Court's consideration the lower court's consideration, Michigan Court Rule 7.210((A)(1). This point was relied upon in footnote 1 of the opinion of the Michigan Court of Appeals. The appellate court noted:

> This court is limited in its review to the lower court record *MCR 7.210(A)(1).* Because the search warrant and Affidavit in support of the search warrant were not part of the lower court record, this court may not consider Those documents and is unaware of the object of the search warrant.

Therefore, petitioner began his appellate review in this matter with a state his procedural error.

According to the preliminary examination testimony of Detroit Police Officer Lamar Penn, he and a raid crew were at 2010 Mullane St. in the City of Detroit on April 20, 2008 at approximately 6:00 p.m. to execute a search warrant at that address. Preliminary Examination Transcript (PET at 4, 7.) Penn testified that the warrant had authorized a search of the Mullane address, a "two story, single family home." *(Id.* at 7), and of "the seller," who,

seller contained in the warrant. (*Id.* at 8)

Officer Penn did not stop and do anything with the purse. Instead, he proceeded to "clear the location and make it safe." (*Id.* at 5) However, he did stop to "confiscate" marijuana from the "dining room floor." The record is silent on the physical layout of the residence, the relationship between the two rooms, whether the marijuana was visible from the "living room," how much of it there was, how it had been packaged, whether there were scales or evidence of drug sales in the home, etc.

After a conversation with Penn, Officer Darryl Stewart searched the purse "lying on floor," and discovered an unloaded pistol.

Defendant filed a motion to suppress the gun and the matter was submitted to the Court without calling witnesses. The parties argued from the lower court transcript. Motion Transcript (MT at 3). Neither party sought to admit the affidavit and warrant.

On direct appeal the Michigan Court of Appeals affirmed the lower court's suppression of the evidence. The Michigan Supreme Court denied leave to appeal.

REASONS TO DENY WRIT

ARGUMENTS

I.

The Petition presents no sound basis for this Court to exercise jurisdiction. The facts reflected in this record are not distinguishable from those in *Ybarra v Illinois* in any significant respect, and therefore, mandate suppression of the evidence that police seized as a result of their unconstitutional search of Ms. Dorsey

INTRODUCTION

In this case, the state essentially asks the Court to create new law; to hold either that a search of a purse of a non-resident present when police enter a residence to execute a search warrant, who dropped it only in response to a police order, and who remained in proximity to it, was permissible as a search of a "container," or that it was a "permissible frisk" for weapons. Our current constitutional requirements provide the needed checks and balances necessary between to accommodate the police and protect the ordinary citizen. Merely granting the police carte blanche is not the answer. Probable cause must be based upon reasonable and articulated facts which are lacking in this case.

DISCUSSION

We begin with an incomplete and insufficient record. It is uncontested that the affidavit and warrant were not properly made part of the record in the trial court. The Michigan Court of Appeals therefore properly held that the prosecution simply failed to make a proper evidentiary record to support its claim. Given the amount of space Petitioner spends effectively trying to distinguish *Ybarra v Illinois,* 444 U.S. 85; 100 S Ct 338; 62 L. Ed.2d 238 (1979), from the case at bar, the significance it attaches to the case is clear. Respondent agrees that *Ybarra* is pivotal to this Court's consideration, but could not disagree more with any attempts to distinguish it from the case at issue. Given that the facts are not meaningfully distinguishable, *Ybarra's* reasoning and holding must control.

The threshold issue must be whether Ms. Dorsey's purse should be considered part of her person for purposes of Federal search and seizure requirements. Despite the paucity of evidence on this record, Officer Lamar Penn clearly testified at the preliminary examination that Ms. Dorsey "had a purse on her arm," (PET at 4) when he entered the home on Mullane with a shotgun. *(Id.* at 9) Ms. Dorsey did not drop her purse as police entered, only when he "froze" her did "she drop her purse to the ground." (*Id.* at 4) As the trial judge explicitly found in her ruling suppressing the evidence, "in

compliance with the freeze, Miss Dorsey's purse fell to the floor," but, even then, "remained in close proximity and close to her person. Motion Transcript of August 13, 2007 (MT at 3)

Of course, as a federal appellate court succinctly reminded in *United States v Yousif*, 308 F.3d 820 (8th Cir. 2002). "reasonable suspicion cannot be manufactured by the police themselves." This conclusion, said the *Yousif* Court, flowed from the Supreme Court's opinion in *Wong Sun v. United States*, 371 U.S. 471, 485; 83 S. Ct. 407; 9 L. E.d2d 441 (1963), that "a contrary holding here would mean that a vague suspicion could be transformed into probable cause for arrest by reason of ambiguous conduct which the arresting officers themselves have provoked." *Yousif* at 829 (*quoting Wong Sun, supra*, at 484, 83 S.Ct. at 415; 9 L. Ed.2d 441).

Ms. Dorsey maintains that the same principle applies here: the fact that Ms. Dorsey dropped her purse only in response to the police order to freeze cannot transform the *nature* of the subsequent search from one of her person to one of a container – even given the undisputable right of police to "freeze" those present.

The Michigan Supreme Court also noted:

> The Fourth Amendment of the United States Constitution protects against unreasonable searches and seizures. The discovery of

> contraband does not validate an illegal search and seizure. A "search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success."

People v LoCicero, 453 Mich. 496, 501; 556 N.W.2d 498, 501 (1996). (footnotes omitted)

Ms. Dorsey maintains that the same principle applies here. The fact that Ms. Dorsey dropped her purse only in response to the police order to freeze cannot transform the *nature* of the subsequent search from one of her person to one of a container – even given the undisputable right of police to "freeze" those present.

As noted in this Court's opinion in *Wong Sun v. United States*, 371 U.S. 471, 485; 83 S. Ct. 407; 9 L. E.d2d 441 (1963), "a contrary holding here would mean that a vague suspicion could be transformed into probable cause for arrest by reason of ambiguous conduct which the arresting officers themselves have provoked."

Ms. Dorsey maintains that the same principle applies here. The fact that Ms. Dorsey dropped her purse only in response to the police order to freeze cannot transform the *nature* of the subsequent search from one of her

person to one of a container – even given the undisputable right of police to "freeze" those present.

In *Ybarra,* Illinois had a statute that authorized police to detain persons present during the execution of a search warrant. *Ybarra v Illinois,* 444 U.S. 85; 100 S. Ct. 338; 62 L. Ed.2d 238 (1979). Unlike the situation here, the Court in *Ybarra* had a well-developed record of both the circumstances leading to the warrant, the items for which the search was authorized, and the facts that unfolded when it was executed.

Specifically, a reliable informant had advised Illinois police that, as he had on approximately ten previous occasions, he had observed tin-foil packets on "Greg," a bartender at the Aurora Tap Tavern. The informant also saw packets, which he knew commonly contained heroin, behind the bar. The observations that led directly to the warrant happened during the weekend, and "Greg" had also told the informant that he would have heroin for sale on Monday. *(Id.* at 88)

Based on these allegations, police obtained a warrant authorizing them to search the Tavern as well as "Greg," who was specifically described. The warrant authorized a search for evidence of the offense of possession of a controlled substance. In relevant part it allowed a search for:

> . . . "[contraband, other controlled substances, money, instrumentalities and narcotics, paraphernalia used in the

> manufacture, processing and distribution of controlled substances.

During a "cursory search for weapons," of Ybarra, a police officer felt "a cigarette pack with objects in it in his pants pocket. *(Id.* at 88-89) The officer did not remove it, but proceeded to pat-down the other customers. Some minutes after first patting Ybarra down, the officer returned to him and again frisked him, removing the cigarette pack from the pocket. (*Id.* at 89) The pack contained tinfoil packets of heroin.

The trial court refused to suppress the seized evidence, relying on the Illinois statute, and defendant was convicted of possession of heroin. In a line of reasoning strikingly similar to that advanced by Petitioner in this case, the Illinois appeals court had upheld the constitutionality of the statute and affirmed Ybarra's conviction stating:

> [t]he court interpreted the statute as authorizing the search of persons found on premises described in a warrant only if there is "some showing of a connection with those premises, that the police officer reasonably suspected an attack, or that the person searched would destroy or conceal items described in the warrant." . . . Accordingly, the State Appellate Court found that the search of Ybarra had been constitutional because it had been "conducted in a one-room bar where it [was] obvious from the complaint
> . . . that heroin was being sold or dispensed," . . . because "the six packets of heroin . . . could easily [have been] concealed by the defendant and thus thwart the purpose of the warrant," . . . and because Ybarra was not an "innocent [stranger] having no connection with the premises," *ibid.*

(Id. at 89-90; 100 S. Ct. 338, 341; 62 L. Ed.2d 238, 244-45) (internal citations omitted).

(Of course in the instant case the Michigan appellate court refused to consider the content of the affidavit and warrant because they were not made part of the record)

This court rejected the state court's reasoning. Of critical importance, and like the case at issue, when police entered to execute the warrant,

> [they] did not recognize [the defendant] and had no reason to believe that [the defendant] had committed, was committing, or was about to commit any offense. . . . [Defendant] made no gestures indicative of criminal conduct, made no movements that might suggest an attempt to conceal contraband, and said nothing of a suspicious nature to the police officer.

(Id. at 91)

"In short," said Justice Stewart, "the agents knew nothing in particular about defendant." While *Ybarra* had been one of others in a "public tavern," there is no evidence on this record to suggest that Ms. Dorsey was anything but a person present with others at a "two-story single family home." (PET at 7)

This Court announced that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. *Ybarra* at 91; 100 S. Ct. at 342; 62 L. Ed.2d at 245 (*citing Sibron v New York,* 392 U.S. 40, 62-63).

At the outset, it is important to note that Ms. Dorsey was not even in "mere proximity to others independently suspected of criminal activity," as the preliminary examination testimony refers to only one "seller," a black male of specific description, who was not found in the home. (PET at 8) Furthermore, the record is also devoid of evidence sufficient to establish the "more" without which, the *Ybarra* Court held, probable cause fails.

In the lower court Petitioner correctly cites to the two Michigan cases that rely upon *Ybarra* for the suppression of evidence. In the first of these cases, *People v Burbank*, 137 Mich. App. 266; 358 N.W.2d 266 (1984), a police officer saw bulges in the brassiere of a woman not named in the search warrant they were executing, who was merely present at the time it was executed. An officer subsequently searched under the clothing of the woman and found drugs. (*Id.* at 267-68; 358 N.W.2d at 348) In response to the prosecutor's argument that the warrant covered the search of the woman, the Court pointed out that, the defendant was not living in the house, and that police did not have probable cause to arrest her. They noted:

> While [the officer] testified that she observed bulges in defendant's clothing, she stated that she had no idea of what caused the bulges until she searched under defendant's clothes. *Since it was not apparent that [defendant] possessed illegal* contraband, Officer Perdue could not arrest defendant or extend the warrant to search her. *People v Secrest*, 413 Mich. 521, 528; 321 N.W.2d 368 (1982).

(Id. at 270; 358 N.W..2d at 270 (footnote omitted). In Ms. Dorsey's case, police had not even seen anything suspicious on Ms. Dorsey's person, any threatening gestures with the purse, even any attempt to "go for" the purse. The search of the purse, therefore, was equally unsupported by probable cause as that of the woman in *Burbank* as the officer there had no suspicion that she would find contraband until after she searched.

In relying upon *Ybarra*, the *Burbank* Court also referred to the fact that someone else present during the search was found to have a controlled substance. *(Id.* at 270; 358 N.W.2d at 349). At that juncture, the Court repeated both the "mere propinquity" language from and the reasoning of the *Ybarra* Court that,

> Each patron who walked into the Aurora Tap Tavern . . . was clothed with constitutional protection against an unreasonable search or an unreasonable seizure. . . . separate and distinct from the Fourth and Fourteenth Amendment protection possessed by the proprietor of the tavern or by 'Greg'. . . . [T]he search warrant, issued upon probable cause, gave the officers . . . no authority whatever to invade the constitutional protections possessed individually by the tavern's customers." 444 U.S. 91-92 (footnotes omitted).

(Id. at 270-71; 358 N.W.2d at 350, *quoting Ybarra*).

The "seller" described in a search warrant in the second Michigan case that relied directly upon *Ybarra* was described as "a black female," of specific age and complexion. In *People v Hawkins*, 163 Mich. App. 196, 197; 413

N.W.2d 704 (1987), while executing the warrant, police encountered the male defendant and patted him down for weapons, discovering two vials of a controlled substance. *(Id.* at 197; 358 N.W.2d at 704-05) The Court "disagreed with the prosecutor's argument that the search of defendant's person was authorized by the warrant." *(Id.* at 197-98; 358 N.W.2d at 705)

As the Court concluded, in *Ybarra,*

> the Supreme Court noted that persons have a constitutional right guaranteed by the Fourth and Fourteenth Amendments to the reasonable expectation of personal privacy. When a search warrant is executed and persons not named in the warrant are searched on the basis that their presence on the premises made them "containers of the evidence," that constitutional right is eroded. *Ybarra, supra. . . .*

(Id. at 198; 413 N.W.2d 705) (citations omitted)

In upholding the trial court's suppression of the evidence, the *Hawkins* Court held that, like the instant case,

> defendant did not live in the house that the police were searching, nor did the police have probable cause to search defendant. Because it was not apparent that defendant possessed illegal contraband, the police could not arrest defendant or extend the warrant to search him.

Id. (Citations omitted).

Petitioner dismisses both *Burbank* and *Hawkins* because they dealt with "search[es] of the person[s] of . . . individual[s] present on the premises," during execution of search warrants, However, given that Ms. Dorsey had the

purse on her arm when armed police entered, that she dropped it only in response and order to "freeze," and that it would otherwise have been part of "her person," these cases are not only relevant, but binding.

Petitioner also attempts to distinguish these cases – as well as the one at issue – from *Ybarra* with the argument that the latter case happened in a bar, asserting, for instance, "*Ybarra* involved a search warrant for a place of public accommodation . . . where persons wholly unrelated to the premises would expect to be found. . . . " In the first of the two cases, *People v Burbank*, 137 Mich. App. 266; 358 N.W.2d 266 (1985), the Court addressed that issue in short order:

> The prosecutor further argues that *Ybarra* is distinguishable since in the instant case defendant was visiting a private residence, not a public place such as a tavern. We are unable to make such a distinction. **Defendant could legitimately expect as much privacy, if not more, when visiting her friends than while being a patron in a public place.**
> 137 Mich. App. 266, 271; 358 N.W.2d 348, 350 (1984).

Petitioner suggests that this honorable court's "recent" (1999) case of *Wyoming v Houghton*, 526 U.S. 295; 119 S. Ct .1297; 143 L. Ed.2d 408 (1999), has "changed the legal landscape," since *Ybarra*. Petitioner's premise is that *Houghton* is relevant because in it the Court allegedly "rejected any 'relationship to the premises' test for the searching of containers which could contain items sought on probable cause." (*Id.* at 11-12) Not only is that a flagrant misstatement of the decision, but *Houghton* was an *automobile*

search case. Petitioner analogizes Ms. Dorsey's purse to a mere container found in an automobile after probable cause has been established and the occupants have been arrested. The obvious distinction is that there was no probable cause to search Ms. Dorsey.

Ms. Dorsey's state court appeal was correctly decided based in part upon the holding Michigan Supreme Court's analysis of this court's decision in Ybarra. The facts reflected in this record are not distinguishable from those in *Ybarra v Illinois* in any significant respect, and, therefore, mandate suppression of the evidence that police seized as a result of their unconstitutional search of Ms. Dorsey pursuant to that United States Supreme Court case and its Michigan progeny. The Michigan Supreme Court's opinion in *People v Coleman*, 436 Mich. 124; 461 N.W.2d 615 (1990), a case relied upon by the Michigan Court of Appeals in this case, upheld the search of a purse during execution of a search warrant, although noting that the purse had not been "under [defendant's] control, or in proximity to her person during execution of the warrant," because it was, in fact, "on a nightstand." The *Coleman* opinion, however, is significant and deserves more than footnote status for this Court's consideration.

In *People v Coleman*, 436 Mich. 124; 461 N.W.2d 615 (1990), the Michigan

Supreme Court upheld a search of purse conducted during the execution of a premises search warrant. The reasons for which the Court upheld the search, however, are substantial:

> The searched premises was a restricted-entry residence and was identified in the affidavit supporting the warrant as a place of suspected drug trafficking. Both Coleman and her purse were in proximity to the contraband described in the warrant. The purse was located in an upstairs bedroom behind a padlocked door and on a nightstand directly next to the alleged drug records -- not a location where a casual visitor or passerby would be expected to leave her belongings. Coleman was discovered positioned directly outside the upstairs bathroom where the police had heard repeated flushing and discovered both the air and the floor surrounding the toilet filled with cocaine residue. The total atmosphere suggested an attempt to conceal evidence subject to the warrant. These facts also show that the defendant had more control over the premises than would a casual visitor or passerby. Therefore, we agree with Judge Doctoroff's conclusion that "these facts evidence more than 'mere propinquity' to the premises" and in fact "show that defendant had a special relationship to the person named in the search warrant and to the home being searched." Consequently, we find that the Court of Appeals erroneously distinguished *People v Stewart, supra.*

(*Id.* at 135-36; 461 N.W.2d at 619-20) (footnotes omitted)

"These facts also show," said the Michigan Supreme Court, "that the defendant had more control over the premises than would a casual visitor or passerby. (*Id.* at 126; 461 N.W.2d at 615)

The Court, therefore, "under the facts of that case," held

> that the defendant's purse was properly searched as a container located on the named premises that might be used to conceal the

> objects designated in the search warrant as items to be seized. We reject the lower courts' findings that the purse was an extension of the defendant's person and thus outside the scope of the premises warrant.

(Id.; 461 N.W.2d 615-16) (emphasis added).

In distinguishing *Ybarra,* the Court said,

> the propriety of the search does not rest on a justification to search a person "merely present" on the premises. The search did not involve the defendant's person or even a personal effect in her possession or under her control. In fact, the purse was across the room from the defendant and closer to . . . the individual named in the search warrant.

436 Mich. at 134; 461 N.W.2d at 618-19 (footnote omitted). The Court continued: "Under these facts, we conclude that the defendant's purse cannot be considered an extension of her person." (*Id.;* 461 N.W.2d at 619)

Under the fact of our case, of course, Ms. Dorsey was "merely present," and, at a minimum, her purse was as "under her control" even after she dropped it as the Court would have used that expression here (if it 'was not in her possession," it could only have been or remained "under her control" if it was "in proximity" to her).

The Michigan Supreme Court found another reason to distinguish its case from *Ybarra:*

> because that decision is based in part on the fact that the police had no reason to believe that the defendant had a connection to the searched premises other than his mere presence as a customer during the warrant's execution at a legitimate business open to the public. The Court found that connection insufficient to allow a

> physical search of Ybarra's person. We find under the facts of this case that the police could discern that Coleman's connection to the premises was more than that of a mere casual or transient visitor who happened fortuitously to be on the premises at the time it was subject to a lawful search.

(Id. at 134-35; 461 N.W.2d at 619)

In *Coleman*, then, the facts revealed the something "more" that the *Ybarra* Court had would require to establish probable cause.

Lest there be any confusion that the *Coleman* Court did, in fact, rely on the "relationship test" in refusing to suppress the evidence in that case, Ms. Dorsey notes the Court's fact-specific conclusion that,

> The purse was not on the defendant's person, under her control, or in proximity to her person during execution of the warrant. Moreover, the facts show that the defendant's connection to the searched premises was more than that of a mere casual or transient visitor, and her purse was located in a place where a casual visitor *would not be expected to leave her belongings.*

(Id. at 135; 461 N.W.2d 619)

When armed police entered 2010 Mullane, Ms. Dorsey "was clothed with constitutional protection against an unreasonable search or an unreasonable seizure. . . . separate and distinct from the Fourth and Fourteenth Amendment protection possessed by" the owner of that home or the "seller" for which police were searching. They had no probable cause to believe she had committed, was committing or was about to commit a crime; they did not recognize her. And, she "made no gestures indicative of criminal

conduct, made no movements that might suggest an attempt to conceal contraband, and said nothing of a suspicious nature to the police officer." Because, therefore, the warrant did not cover a search of her, and police had no other evidence to suspect her, the search was unsupported by probable cause, and *Ybarra v Illinois* dictate that suppression of the evidence obtained from the unconstitutional search must be upheld.

ARGUMENT II

The police are bound by the confines of their search warrant based upon the facts submitted to the magistrate in the affidavit. The police should not be allowed to search persons who are merely present where there is insufficient probable cause to do so. Ms. Dorsey's purse was not within the scope of the warrant.

Previously, Petitioner argued that the distinctions between container searches in automobile and a search of the person in a home are mere formalities, and urged the court to do away with the obvious reasons for these distinctive protections. In their second argument the Petitioner encourages the court to ignore the distinctions between the probable cause necessary for a *seizure* of the person and the personal *search* of a person. Petitioner admittedly wants the police to have "unquestioned command of the situation." Merely using the word "firearm" in conjunction with the drug trade, in the search warrant affidavit (which again, was not admitted here), does not automatically give the police the right to frisk every person present at the targeted location. Detaining a person for safety reasons is understandable. However, when the location is deemed safe, if there is no reason for further detention, the citizen should be allowed their liberty.

Petitioner argues that even if this Court rules that the search of Ms. Dorsey's purse was a search of her person, it was justified as a permissible frisk of those present when a warrant is executed for weapons. Not true.

This is simply not a situation where there is any reason whatsoever to believe that any contraband would be found in Ms. Dorsey's purse which just previously was hanging upon her arm, and thereafter, at her feet. Also, there are no articulated facts indicating that Ms. Dorsey required her purse for any reason after she dropped it, such as to produce identification. At least in this circumstance an argument could be made that the police needed to look in the purse before she regained possession.

There was *nothing* in this record which indicated a need to search every person on the premises.for weapons and contraband. Yet, Petitioner seeks a ruling from this court which holds in essence, that whenever the police merely utter the words "guns and drugs" in the search warrant affidavit, during the execution of the warrant on a suspected drug house, all occupants must be at least briefly detained and frisked.

In support, Petitioner cites *Michigan v Summers*, 452 U.S. 692; 101 S. Ct. 2587; 69 L. Ed.2d 340 (1981), but only for the proposition that officers executing a search warrant clearly may, to ensure the full and safe execution of the warrant, ordinarily detain all present on the premises for the time necessary to complete the search, a general proposition with which Respondent does not disagree. It is critical to mention however, that as Petitioner notes, *Summers* is a *seizure* case, not a *search* case, an important distinction. This court has always held that a "seizure" or "detention," in

the prosecution's words, requires less probable cause in support than do "searches." In, *United States v Segura*, 468 U.S. 796, 806; 104 S. Ct. 3380, 3386; 82 L. Ed.2d 599, 609-10 (1983 for instance, the Court said,

> Different interests are implicated by a seizure than by search. . . . A seizure affects only the person's possessory interests; a search affects a person's privacy interests. . . . Recognizing the generally less intrusive nature of a seizure, *Chadwick, supra*, at 13-14, n. 8; *Chambers v. Maroney, supra*, at 51, the Court has frequently approved warrantless seizures of property, on the basis of probable cause, for the time necessary to secure a warrant, where a warrantless search was either held to be or likely would have been held impermissible. (collection of supporting citations and footnote omitted).

Even here, as the Court notes, warrantless seizures still require probable cause. Further, Petitioner concedes that Ms. Dorsey could be detained, *while the home that was the subject of the warrant was searched.* However, that is not the issue here, and *Summers* did not take the additional step of authorizing a detention and search of a non-resident present when a warrant is executed. In fact, in *Summers* the detention of an occupant was due explicitly to the "articulable and individualized suspicion" attached to such a person, as follows:

> It is also appropriate to consider the nature of the articulable and *individualized* suspicion on which the police base the detention of the occupant of a home subject to a search warrant. . . . A judicial officer has determined that police have probable cause to believe that someone in the home is committing a crime. Thus a neutral magistrate rather than an officer in the field has made the critical determination that the police should be given a special authorization to thrust themselves into the

> privacy of a home. The connection of an occupant to that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant.

Summers at 703-04; 101 S. Ct. at 2594-595; 69 L. Ed.2d at 350 (footnote omitted)

The *Summers* concern that suspicion be particularized when a warrant is issued was actually enunciated by the Supreme Court first in *Ybarra*, a case much closer factually than *Summers*. Writing for the majority in *Ybarra*, Justice Stewart said,

> Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The *Fourth* and *Fourteenth Amendments* protect the "legitimate expectations of privacy" of persons, not places. See *Rakas v. Illinois*, 439 U.S. 128, 138-143, 148-149; *Katz v. United States*, 389 U.S. 347, 351-352.

Ybarra at 91; 100 S. Ct .at 342; 62 L. Ed.2d at 245.

The *Summers* Court itself referred to the search/seizure distinction between the case before it and *Ybarra*:

> The "seizure" issue in this case should not be confused with the "search" issue presented in *Ybarra v. Illinois*, 444 U.S. 85. In *Ybarra*. . . . [n]o question concerning the legitimacy of the detention was raised. Rather, the Court concluded that the search of Ybarra was invalid because the police had no reason to believe he had any special connection with the premises, and the police had no other basis for suspecting that he was armed

> or in possession of contraband. *See id.,* at 90-93. In this case, only the detention is at issue.

Summers at 345 n 4; 101 S. Ct. at 345; 69 L. Ed.2d at 2590

The state in *Ybarra* made an argument similar to the one advanced by the Petitioner here: "that the first patdown search of Ybarra constituted a reasonable frisk for weapons under the doctrine of *Terry v. Ohio,* 392 U.S. 1, 92; 88 S. Ct.1868; 92 L. Ed.2d 210 (1968) . The Court dealt with that argument quite succinctly:

> We are unable to take even the first step required by this argument. The initial frisk of Ybarra was simply not supported by a reasonable belief that he was armed and presently dangerous, a belief which this Court has invariably held must form the predicate to a patdown of a person for weapons. *Adams v. Williams,* 407 U.S. 143, 146; *Terry v. Ohio, supra,* at 21-24, 27. When the police entered the Aurora Tap Tavern on March 1, 1976, the lighting was sufficient for them to observe the customers. Upon seeing Ybarra, they neither recognized him as a person with a criminal history nor had any particular reason to believe that he might be inclined to assault them. Moreover, as Police Agent Johnson later testified, Ybarra, whose hands were empty, gave no indication of possessing a weapon, made no gestures or other actions indicative of an intent to commit an assault, and acted generally in a manner that was not threatening. . . In short, the State is unable to articulate any specific fact that would have justified a police officer at the scene in even suspecting that Ybarra was armed and dangerous.

(Id. at 92-93; 100 S. Ct. at 343; 62 L. Ed.2d at 93) (footnote omitted).

As in *Ybarra,* the "lighting was sufficient" for the police in this case to "observe" the three women at the Mullane address. As in *Ybarra,* "they

neither recognized defendant as a person with a criminal history nor had any particular reason to believe she might be inclined to assault them." As in *Ybarra*, Ms. Dorsey "gave no indication of possessing a weapon, made no gestures or other actions indicative of a intent to commit an assault, and acted generally in a manner that was not threatening."

Petitioner also relies upon *Muehler v Mena*, 544 U.S. 93; 125 S. Ct. 1463; 161 L. Ed. 2d 299 (2005) to support its theory that the search of the purse, if construed as a search of Ms. Dorsey's person, was justified as "a permissible frisk." Yet, in the entire *Muehler* opinion, the Court never addresses the issue of a frisk, let alone suggesting that "[f]risking those detained under *Summers/Muehler* is ordinarily permissible." *(Id.* at 14) Instead, *Muehler* dealt exclusively with the detention of a defendant in handcuffs while a search pursuant to warrant proceeded. 544 U.S .93, 95; 125 S. Ct.1465, 1468; 161 L Ed.2d 299, 305. Again, a *seizure* of a person has been historically viewed as less intrusive than a *search* of a person.

Additionally, the Petitioner also argues "assuming no grounds for Ms. Dorsey's arrest arose," which would, of course, mean that no magistrate would subsequently issue a warrant to search the purse if seized, and "assuming the purse may not be searched under the authority of the warrant," then the police should be allowed to examine it to make sure they

were not injured. Respondent submits that this is the ultimate tautology. §There was not sufficient probable cause to obtain a search warrant for the purse; and the warrant already issued, did not authorize it.

In summary, as in *Ybarra*, "the State is unable to articulate any specific fact that would have justified a police officer at the scene in even suspecting that [defendant] was armed and dangerous." Therefore, as the Court did in *Ybarra*, Ms. Dorsey respectfully asserts that this Honorable Court must reject the Petitioner's argument in this regard.

CONCLUSION

Ms. Dorsey's case was correctly decided by the State court within the clear confines of our constitution with the guidance from this honorable court.. Petitioner wants this court to make new law. Unfortunately, the facts do not support his plight.

Procedurally, he is at a disadvantage because the affidavit and warrant were not made part of the record in the lower court, and therefore inadmissible here even though Petitioner has attached a copy to his petition.

Factually, he is unsuccessful in his attempts to show Ms. Dorsey gave up control of her purse. If not for the command by the police she would still be holding it. However, it was found at her feet where she dropped it. Ms. Dorsey and her purse were in a common area of the home near the entry.

There is no evidence linking Ms. Dorsey to the marijuana found in the living room. There is no evidence to suggest that Ms Dorsey exercised any control over the premises. There is no evidence that Ms. Dorsey had any special relationship to the person or home named in the warrant. Under these circumstances the purse must be considered an extension of her person.

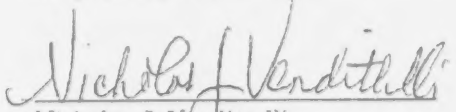
Substantively, the current state of the law does not support Petitioner's position. Therefore, he is left with the mission of urging this court to carve out new constitutional law. Petitioner would have the court allow for the search of any person found in a named location simply by stating in the supporting affidavit that drugs and guns may be found. He urges this court to consider a woman's purse like any other container found in automobile searches. Finally, he encourages the court to consider the search of everyone merely part of the detention process for police safety. These are not sound extensions of our constitutional law. Respondent does not dispute that it is often the case that police work is dangerous. However, where the police can articulate through particular facts that a situation requires broad powers the warrant process is flexible. Our current constitutional requirements provide the needed checks and balances necessary between to accommodate the police and protect the ordinary citizen. Merely granting the police carte blanche is not the answer, and

Petitioner's does not present a compelling argument for this court to take such extraordinary action. Probable cause must be based upon reasonable and articulated facts which are lacking in this case.

RELIEF SOUGHT

WHEREFORE, Respondent respectfully prays this Honorable Court to deny certiorari in this case

Respectfully submitted,



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